
ESSAY

SOME FRIENDLY SUGGESTIONS FOR THE FEDERAL JUDICIARY ABOUT ACCOUNTABILITY

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In 2003, the Judicial Council of the Ninth Circuit established and posthumously awarded an outstanding lawyer award to accomplished civil rights lawyer and scholar John Paul Frank, and it has since conferred this award in his name on a yearly basis.¹ The award is intended to recognize a lawyer who has “demonstrated outstanding character and integrity; dedication to the rule of law; proficiency as a trial and appellate lawyer; success in promoting collegiality among the members of the bench and bar; and a lifetime of service to the federal courts of the Ninth Circuit.”²

John, a friend of the Ninth Circuit and the federal judiciary, as well as a personal friend, mentor, and colleague in the American Law Institute, was a renowned lawyer, author, law professor, and civil rights trailblazer. In a memorial tribute to him, Chief Judge of the Ninth Circuit Mary Schroeder said, “John was a counselor in every way. He helped everyone who needed him, and at one time or another, everyone did.”³ During his lifetime of

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¹ U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, 2003 ANNUAL REPORT 18 (2003), https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2003.pdf [<https://perma.cc/RB9Q-YS9D>].

² U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, 2004 ANNUAL REPORT 42 (2004), https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2004.pdf [<https://perma.cc/5LRP-YDLX>].

³ Mary M. Schroeder, *John P. Frank: Mentor and Counselor*, 35 ARIZ. ST. L.J. 227, 227 (2003). For additional tributes in the same issue of the law journal, see Stanley G. Feldman, *Christmas Cards from JPF*, 35 ARIZ. ST. L.J. 233 (2003); Janet Napolitano, *John P. Frank's Pro Bono Activities*, 35 ARIZ. ST. L.J. 229 (2003); George Paul, *John Frank and the "Law Professors' Brief,"* 35 ARIZ. ST. L.J. 241 (2003); Michael Traynor, Foreword, *John P. Frank*, 35 ARIZ. ST. L.J. 219 (2003).

distinguished service, he fought against school and work segregation, worked alongside Thurgood Marshall and the NAACP in litigation that would culminate in *Brown v. Board of Education*, and represented the defendant in the pathbreaking case of *Miranda v. Arizona*.

John was also known in legal circles for his high regard for the federal judiciary and his strong opinions on the caliber of judicial behavior befitting an Article III appointment. He was a staunch defender of Judge Clement F. Haynesworth Jr.'s nomination to the Supreme Court, harshly criticized Judge Robert Bork's nomination, and together with Janet Napolitano advised Anita Hill during the Senate Judiciary Committee hearing on Clarence Thomas's nomination.

Like John Frank was, I am deeply concerned with the quality of judicial behavior that a seat on the federal bench must require. In his memory and spirit, I feel compelled to voice my concerns and offer suggestions at a time when judicial independence is under siege.

Over the course of a legal career of almost sixty years that is now winding down, I have appeared on behalf of clients before many judges, trial and appellate, federal and state, and have welcomed the opportunity to serve on professional projects with some of these judges. I have always appreciated their independence, objectivity, courtesy, and respect to everyone before them; their unwavering dedication to providing a fair hearing; and their diligent search for the right answers to the cases before them. On rare occasions there have been disappointments, not so much in their rulings—where one learns to expect wins, losses, mixed decisions, and occasional surprises—but in some instances of pettiness or departure from the high standards of judicial behavior.

With appreciation and respect for the devoted commitment of judges to the rule of law and fairness, and with some diffidence, I venture a series of friendly suggestions for strengthening federal judicial accountability alongside the views expressed by my esteemed American Law Institute colleague Professor Stephen Burbank in his recent essay, *Reconsidering Judicial Independence: Forty-Five Years in the Trenches and in the Tower*,⁴ which catalyzed this collection in the *University of Pennsylvania Law Review Online*. These suggestions arise from my deep concern that the federal judiciary is facing serious challenges and sometimes virulent attacks; that it must be vigilant and pursue its present system of self-governance with rigor and integrity; and that if it does not do so, it may lose this self-governance or experience unwanted interference that may impair judicial independence. These suggestions come not just from experience and general observation but also from my review of the recent changes in judicial conduct rules and primary

⁴ Stephen B. Burbank, *Reconsidering Judicial Independence: Forty-Five Years in the Trenches and in the Tower*, 168 U. PA. L. REV. ONLINE 17 (2019).

source material from the related hearings, including the hearing video, witness statements, written submissions from noted law professors and others, related reports, complaints, and a sampling of dispositions from each of the circuit court judicial councils. In short, I suggest continual evaluation of judicial rules and conduct, increased scrutiny of nominees, and other steps to address any judicial behavior that fails to meet the standard of good behavior required by the Constitution.

Independent federal judges are essential to our democracy and the rule of law. They may be called on to require high officials, including the President, to obey the law.⁵ They regularly confront the challenge of deciding whether to accept or reject an asserted federal right to a claim or defense, or to at least recognize the possibility that it might emerge someday from “the womb of time.”⁶ Most act with care and decency, judicial temperament, respect for law

⁵ See *United States v. Nixon*, 418 U.S. 683 (1974) (ruling that executive privilege did not shield President Nixon from complying with the subpoena to produce the Watergate tapes).

⁶ See, e.g., *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting) (“[I]t [is not] desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant . . .”), *modified* (Mar. 18, 1944). For a current example of the challenge, compare the trial court’s decision to not dismiss at the outset of the case a claim against the United States to take action on climate change in *Juliana v. United States*, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016), and the Ninth Circuit’s subsequent divided-panel decision ordering dismissal for lack of standing in *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020), with the recent decision of the Supreme Court of the Netherlands in *State of the Netherlands v. Stichting Urgenda* that the government needed to adopt measures to reduce greenhouse gas emissions, HR 20 december 2019, NJ 2020, 41 m.nt. JS (De Staat Der Nederlanden/Stichting Urgenda) (Neth.); see also John Schwartz, *In ‘Strongest’ Climate Ruling Yet, Dutch Court Orders Leaders to Take Action*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/climate/netherlands-climate-lawsuit.html> [<https://perma.cc/8A4Q-AHPD>]. For a discussion of the adoption of the Johannesburg Principles on the Role of Law and Sustainable Development in August 2002, which affirmed the commitment “to spare no effort to free all of humanity, and above all our children and grandchildren from the threat of living on a planet irredeemably spoilt by human activities” and has been cited in support of a human right to a healthful environment, see Governing Council of the U.N. Env’t. Program, Report of the Global Judges Symposium on Sustainable Development and the Role of Law, UNEP/GC.22/INF/24 (2002) (emphasis removed); Michael Traynor, *On Environmental Law*, 132 DAEDALUS, no. 3, 2003, at 116, 116. On the role of judges in the development of law, Justice Cardozo stated: “[T]he power to declare the law carries with it the power, and within limits the duty, to make law when none exists . . .” BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 124 (1921); see also William H. Rehnquist, *Remarks on the Process of Judging*, 49 WASH. & LEE L. REV. 263, 270 (1992) (“[J]udging is not simply an exercise in intellectual virtuosity. . . . It is this sort of institutional constraint and discipline . . . that itself furnishes a very substantial check on judges who might otherwise be guided only by their individual predilections in any given case.”). As California Supreme Court Justice Roger J. Traynor explained:

A judge who meditates law and social change in a democratic society is bound to be preoccupied with the role of the courts. Nevertheless he is bound also to recognize that the task of law reform is that of the legislators, which is to say that it is primarily that of the people.

Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 239.

and people, and courage when needed. Sometimes they are timid when courage is needed.⁷ May the day never “come when judges lose heart, when restraint becomes timidity and timidity complicity, and when we cannot count on either judges or legislators to protect our liberty, particularly against an executive branch that represses it.”⁸

Appointed by the President and confirmed by the Senate, federal judges hold office “during good behavior” as provided in Article III of the Constitution.⁹ They are protected against removal from office except upon impeachment by the House of Representatives and trial and removal by the Senate.¹⁰ The current process of selection, vetting, and confirmation has

⁷ Nancy Gertner, *The “Lower” Federal Courts: Judging in a Time of Trump*, 93 IND. L.J. 83, 90 (2018) (referring to “judicial can’t” and the increasing importance of addressing the “‘duck, avoid, and evade’ doctrines when they are inappropriate”). For a few of many possible examples of judicial courage, see, e.g., *Hirabayashi v. United States*, which granted a writ of coram nobis to vacate convictions of Gordon Hirabayashi, 828 F.2d 591 (9th Cir. 1987) (Schroeder, J.); *Korematsu v. United States*, which granted a writ of coram nobis to vacate conviction of Fred Korematsu, 584 F. Supp. 1406 (N.D. Cal. 1984) (Patel, J.); and the litigation over serious mental and medical conditions in California prisons, which *Brown v. Plata*, 563 U.S. 493 (2011), affirmed, Judge Thelton E. Henderson, Address (May 16, 2006), in AM. LAW INST., REMARKS AND ADDRESSES: 83RD ANNUAL MEETING SPEECHES 33, 38-48 (2006). The writs of coram nobis in *Hirabayashi* and *Korematsu* preceded by many years the government’s confession of error in those cases. See Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, DEP’T OF JUSTICE (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [<https://perma.cc/6JLW-NZ39>] (confessing error in the *Hirabayashi* and *Korematsu* cases). See generally Neal K. Katyal, *The Solicitor General and the Confession of Error*, 81 FORDHAM L. REV. 3027 (2013) (discussing the history of confessions of error and describing the Solicitor General’s errors in *Hirabayashi* and *Korematsu*, such as omitting relevant adverse evidence from the Supreme Court briefs).

⁸ Michael Traynor, Address (May 20, 2008), in AM. LAW INST., REMARKS AND ADDRESSES: 85TH ANNUAL MEETING SPEECHES 29, 47 (2008).

⁹ U.S. CONST. art III, § 1.

¹⁰ See *id.*; 28 U.S.C. § 354(a)(3)(A) (2018) (“Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.”). Section 355(b) provides for certification by the Judicial Conference to the House of Representatives if it determines that “consideration of impeachment may be warranted.” 28 U.S.C. § 355(b). Sections 351 through 364 generally address complaints against judges and judicial discipline. *Id.* §§ 351–64. The Supreme Court has also recognized the need for constraints on judicial conduct:

There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business.

Chandler v. United States, 398 U.S. 74, 84 (1970); see also *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of the U.S.*, 264 F.3d 52, 64-69 (D.C. Cir. 2001) (rejecting arguments that administrative reprimands against Article III judges authorized by the Judicial Council are unconstitutional under separation of powers and judicial independence implicit in Article III itself). For discussion of the meaning of tenure “during good behavior,” see generally, e.g., Harry T. Edwards, *Regulating Judicial Misconduct and Divining “Good Behavior” for*

undeniably become increasingly politicized. This politicization is aggravated by the Senate's limitations on debate,¹¹ the virtual elimination of the "blue slip,"¹² the somewhat diminished influence on this Administration and Senate of the important recommendations of the American Bar Association's Standing Committee on the Federal Judiciary,¹³ and a notable increase in party-line voting.¹⁴ The present politicization—and its seemingly inevitable counterreaction if a different party gains the presidency, or a Senate majority, or both—should be replaced with a system centered on finding, nominating, and confirming federal judicial candidates of unquestionable merit, integrity,

Federal Judges, 87 MICH. L. REV. 765 (1989); Saikrishna Prakash & Steven D. Smith, *How To Remove a Federal Judge*, 116 YALE L.J. 74, 88-128 (2006).

¹¹ Both Democratic and Republican Senate majorities in recent times have invoked the "nuclear option"—changing the Senate rules to allow cloture by mere majority instead of three-fifths vote—to shorten debate on judicial confirmations, although only the Republicans have done so to push through a Supreme Court nominee. See Matt Flegenheimer, *Senate Republicans Deploy "Nuclear Option" to Clear Path for Gorsuch*, N.Y. TIMES (April 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/CKB9-VNSJ>] (describing Republicans' use of the nuclear option to confirm Gorsuch); Paul Kane, *Reid, Democrats Trigger "Nuclear" Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/do65cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html [<https://perma.cc/S5GF-Q8VB>] (discussing the Democrats' use of the nuclear option to confirm federal judicial nominees and executive appointees); Glenn Thrush, *Senate Republicans Go Nuclear to Speed up Trump Confirmations*, N.Y. TIMES (April 3, 2019), <https://www.nytimes.com/2019/04/03/us/politics/senate-republicans-nuclear-option.html> [<https://perma.cc/H2D7-E4L4>] (discussing the Republicans' use of the nuclear option to confirm federal judicial nominees and executive appointees).

¹² See Jordain Carney, *Senate Confirms Trump Court Pick Despite Missing Two Blue Slips*, HILL (Feb. 26, 2019), <https://thehill.com/homenews/senate/431717-senate-confirms-trump-court-nominee-despite-missing-two-blue-slips> [<https://perma.cc/WTQ9-GVKL>]. The blue slip process is tailored to encourage good-faith debate when it comes to life tenure. See Carl Tobias, *Senate Blue Slips and Senate Regular Order*, YALE L. & POL'Y REV. INTER ALIA (Nov. 20, 2018), https://ylpr.yale.edu/inter_alia/senate-blue-slips-and-senate-regular-order [<https://perma.cc/2U7W-TACF>] (arguing that the "[e]limination or alteration [of the blue slip process] could jeopardize the Senate's discharge of its constitutional responsibility . . . and undermine the institution itself"). But see David Lat, *Opinion, Good Riddance to Blue Slips*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2018/05/09/opinion/senate-judicial-nominees-blue-slips.html> [<https://perma.cc/6VY4-3NUV>] (arguing that "going forward, presidents of both parties will benefit from [the elimination of the blue slip process]—and so will the federal judiciary, which will operate at or near capacity for longer").

¹³ E.g., Tony Mauro, *Ignored or Attacked, ABA Committee Persists in Ranking Judicial Nominees*, NAT'L L.J. (Nov. 8, 2019, 10:17 AM), <https://www.law.com/nationallawjournal/2019/11/08/ignored-or-attacked-aba-committee-persists-in-ranking-judicial-nominees/> [<https://perma.cc/M4NN-AZPA>].

¹⁴ The data makes this clear. See Akhil Jalan, *Political Partisanship: A Look at the Data*, TOWARDS DATA SCI. (Aug. 2, 2017), <https://towardsdatascience.com/political-partisanship-a-look-at-the-data-e71946199586> [<https://perma.cc/87MU-BFNM>] (describing how data points compiled from Brookings Institution's *Vital Statistics on Congress* shows steady increase in party voting since the 1950s).

independence, judicial temperament, and emotional intelligence.¹⁵ One of our greatest judges, the late Richard Arnold, put it simply and eloquently: “There has to be a safe place.”¹⁶

U.S. District Court Senior Judge Paul L. Friedman stated in his recent and acclaimed Judge Thomas A. Flannery Lecture that President Trump “violates all recognized democratic norms” in his repeated attacks and personal insults toward federal judges, and threatens the independence of the federal judiciary.¹⁷ In a meeting with evangelical leaders Trump promised, “[I]f it’s my judges, you know how they’re going to decide. . . . I’m putting pro-life judges on.”¹⁸ He promised that “[w]e’re going to have great judges,

¹⁵ The literature on the selection of judges is ample. For a few recent examples, see generally, e.g., DUE PROCESS OF LAW FOUND., SELECTING THE VERY BEST: THE SELECTION OF HIGH-LEVEL JUDGES IN THE UNITED STATES, EUROPE AND ASIA (2013), http://www.dplf.org/sites/default/files/selection_high_level_judges_en.pdf [<https://perma.cc/S7FF-ABME>]; Terry Maroney, *The Emotionally Intelligent Judge: A New (and Realistic) Ideal*, 2016 REVISTA FORUMUL JUDECĂTORILOR [JUDICIARY F. REV.], no. 1, at 61; Carlton W. Reeves, *Defending the Judiciary: A Call for Justice, Truth, and Diversity on the Bench, Remarks upon Receiving the Thomas Jefferson Foundation Medal in Law* (Apr. 11, 2019), https://www.law.virginia.edu/sites/default/files/transcripts/transcript_o.pdf [<https://perma.cc/CH75-FYNU>]; Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15 AM), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> [<https://perma.cc/5A23-CFEY>]; *Building the Bench*, ALL. FOR JUSTICE, <https://www.afj.org> [<https://perma.cc/6EJR-HEYH>] (last visited Mar. 30, 2020). The Federalist Society does not itself sponsor or endorse nominees, but its influence is well known. See, e.g., Lydia Wheeler, *Meet the Powerful Group Behind Trump’s Judicial Nominations*, HILL (Nov. 16, 2017), <https://thehill.com/regulation/court-battles/360598-meet-the-powerful-group-behind-trumps-judicial-nominations> [<https://perma.cc/Q3BH-8H5F>] (describing the Federalist Society’s role in Trump’s judicial nominations and the relationships between the society and current members of the federal bench).

¹⁶ See David Souter, *Remarks by Justice Souter*, 99 GEO. L.J. 157, 161 (2010) (quoting a speech by Judge Arnold).

¹⁷ Paul L. Friedman, *Threats to Judicial Independence and the Rule of Law, Eleventh Annual Judge Thomas A. Flannery Lecture* (Nov. 18, 2019), <https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/> [<https://perma.cc/SD4S-HQKB>]; see also C. Ryan Barber, *‘This is Not Normal’: US Judge Denounces Trump’s Attacks on Judiciary*, NAT’L L.J. (Nov. 7, 2019, 12:47 PM), <https://www.law.com/nationallawjournal/2019/11/07/this-is-not-normal-us-judge-denounces-trumps-attacks-on-judiciary/> [<https://perma.cc/DRM4-HCRS>] (describing Judge Friedman’s remarks and the standing ovation he received); Katie Shepherd, *Trump ‘Violates All Recognized Democratic Norms,’ Federal Judge Says in Biting Speech on Judicial Independence*, WASH. POST (Nov. 8, 2019, 6:41 AM), <https://www.washingtonpost.com/nation/2019/11/08/judge-says-trump-violates-democratic-norms-judiciary-speech/> [<https://perma.cc/3L3L-PZK3>] (recounting Judge Friedman’s remarks and Trump’s attacks on judges).

¹⁸ Jon Ward, *Transcript of Donald Trump’s Closed-Door Meeting with Evangelical Leaders in New York City*, YAHOO NEWS (June 22, 2016), <https://www.yahoo.com/news/transcript-donald-trumps-closed-door-meeting-with-evangelical-leaders-195810824.html> [<https://perma.cc/84ZC-HMHV>].

conservative, all picked by the Federalist Society.”¹⁹ As of February 14, 2020, the President, with the collaboration and confirmation of a majority of United States senators, has appointed 192 Article III judges,²⁰ mostly white men, many of them young.²¹ It would be realistic to expect at least some of them to be ambitious for promotion to a higher court or be chosen for another prestigious assignment.²²

¹⁹ See Ian Millhiser, *Trump Says He Will Delegate Judicial Selection to the Conservative Federalist Society*, THINK PROGRESS (June 15, 2016, 7:26 PM), <https://thinkprogress.org/trump-says-he-will-delegate-judicial-selection-to-the-conservative-federalist-society-26f622b10c49/> [https://perma.cc/T3JF-3BSR] (quoting from a Trump interview on Breitbart News).

²⁰ Article III confirmations during the Trump Administration include two judges on the Court of International Trade, 137 district court judges, fifty-one courts of appeals judges, and two Supreme Court Justices. *Donald Trump Is Appointing Federal Judges at a Blistering Pace*, ECONOMIST: DAILY CHART (Feb. 14, 2020), <https://www.economist.com/graphic-detail/2020/02/14/donald-trump-is-appointing-federal-judges-at-a-blistering-pace> [https://perma.cc/P8XB-KTSX].

²¹ See, e.g., Stacy Hawkins, *Trump's Dangerous Judicial Legacy*, 67 UCLA L. REV. DISCOURSE 20, 22-23 (2019), <https://www.uclalawreview.org/trumps-dangerous-judicial-legacy> [https://perma.cc/7SJU-4LR5] (concluding that the lack of diversity in President Trump's Article III nominees is part of an underlying “deliberate attempt to undo decades of diversity progress on the federal judiciary”); Carrie Johnson & Renee Klahr, *Trump Is Reshaping the Judiciary: A Breakdown by Race, Gender and Qualification*, NPR (Nov. 15, 2018, 5:00 AM), <https://www.npr.org/2018/11/15/667483587/trump-is-reshaping-the-judiciary-a-breakdown-by-race-gender-and-qualification> [https://perma.cc/V3S9-C8CT] (noting that most of Trump's judicial nominees are white men); Tom McCarthy, *Trump's Legacy: Conservative Judges Who Will Dominate US Law for Decades*, GUARDIAN (Mar. 10, 2019, 4:00 PM), <https://www.theguardian.com/us-news/2019/mar/10/trump-legacy-conservative-judges-district-courts> [https://perma.cc/7R24-QMSY] (quoting Alliance For Justice legal director Daniel L. Goldberg as stating that “Trump's judges will now shape American life according to the narrow conservative vision of the elite, predominantly white and male groups guiding Trump's hand as he makes his picks”); Joel B. Pollak, *Trump Taking Over Liberal Ninth Circuit: Appointed 9 of 29 Judges*, BREITBART NEWS (Dec. 23, 2019), <https://www.breitbart.com/politics/2019/12/23/trump-taking-over-liberal-ninth-circuit-appointed-9-of-29-judges/> [https://perma.cc/8BTU-E]23] (noting that Trump's judicial appointments to the Ninth Circuit have shifted the ideological balance of the historically liberal Ninth Circuit); Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html> [https://perma.cc/C3NR-D7FB] (“Trump's appointees have tended to be unusually well credentialed and conservative.”).

²² See Lee H. Rosenthal, *Ambition and Aspiration: Living Greatly in the Law*, 103 MARQ. L. REV. 217, 226-32 (2019) (comparing “ambitious” judging, which is driven by external validation like promotions, recognition, or entrenchment of ideological beliefs, with “aspirational” judging, which is motivated by, among other traits, “recognition of uncertainty, of indeterminacy, and of limited knowledge” and “the spirit which seeks to understand the minds of other men and women”). As I explained during the 2006 *Constitution Day Lecture* at Golden Gate University School of Law,

It is one thing to expect a judge not to be influenced by pecuniary concerns or physical threats if adequate salary and reasonable security are provided. It may be another to expect a judge not to be influenced by the subtle pressures of personal ambition, for example, the wish to be promoted to a higher court, to be chosen for a prestigious assignment, or, for some state judges, to be either reelected, retained, or reappointed as state judges or appointed to the federal bench.

Michael Traynor, *Judicial Independence: A Cornerstone of Liberty*, 37 GOLDEN GATE U. L. REV. 487, 492 (2007).

By a partisan vote of 51 to 44, the Senate recently confirmed a nominee for the Ninth Circuit who was rated as not qualified by the American Bar Association's Standing Committee on the Federal Judiciary,²³ which rarely gives such a poor rating.²⁴ The ABA Committee described him as "arrogant, lazy, an ideologue, and lacking in knowledge of the day-to-day practice including procedural rules."²⁵ It based its negative recommendation on an extensive evaluation and sixty interviews "with a representative cross section of lawyers (43), judges (16), and one other person who have worked with the nominee in the four states where he has worked and who are in a position to assess his professional qualifications," and on a review of "more than 600 pages of publicly produced emails involving and/or written by Mr. VanDyke, news reports where Mr. VanDyke has been interviewed, and articles and opinions written about him."²⁶ The Committee said, "There was a theme that the nominee lacks humility, has an 'entitlement' temperament, does not have an open mind, and does not always have a commitment to being candid and truthful."²⁷ Judge VanDyke "fills the seat of Circuit Judge Jay S. Bybee, who [assumed] senior status on December 31, 2019."²⁸ The Committee, which is composed of highly regarded members and known for its thoroughness,²⁹ has

²³ See *Standing Committee on the Federal Judiciary*, AM. BAR ASS'N, <https://www.americanbar.org/groups/committees/federal-judiciary> [<https://perma.cc/YC48-53M9>] (last visited Mar. 20, 2020).

²⁴ See Letter from William C. Hubbard, Chairman, Am. Bar Ass'n Standing Comm. on the Fed. Judiciary, to Lindsey Graham, Chairman, and Dianne Feinstein, Ranking Member, Senate Comm. on the Judiciary 1 (Oct. 29, 2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/10-29-2019-vandyke-rating.pdf?logActivity=true [<https://perma.cc/G4EV-JHND>] [hereinafter Hubbard Letter] ("[A] substantial majority of the Committee has determined that Mr. VanDyke is 'Not Qualified,' and a minority determined that he is 'Qualified' to serve on the United States Court of Appeals for the Ninth Circuit."); see also Debra Cassens Weiss, *ABA Committee Gives 'Not Qualified' Rating to 9th Circuit Nominee Said to Have 'Entitlement Temperament'*, A.B.A. J. (Oct. 3, 2019, 5:02 PM), <https://www.abajournal.com/news/article/aba-gives-not-qualified-rating-to-9th-circuit-nominee-said-to-have-entitlement-temperament> [<https://perma.cc/E9P8-6XDZ>] (noting that of the Trump Administration's 264 judicial nominees, nine—or 3%—received a rating of "not qualified"). For the roll call vote, see 165 CONG. REC. S6986 (daily ed. Dec. 11, 2019) (Vote No. 391). Five senators did not vote (Bennett, D-CO; Booker, D-NJ; Paul, R-KY; Sanders, I-VT; and Warren, D-MA). *Id.*

²⁵ Hubbard Letter, *supra* note 24, at 1.

²⁶ *Id.*

²⁷ *Id.* at 1-2.

²⁸ Press Release, U.S. Court of Appeals for the Ninth Circuit, Senate Confirms Lawrence VanDyke to Seat on Ninth Circuit Court of Appeals 1 (Dec. 11, 2019), http://cdn.ca9.uscourts.gov/datastore/ce9/2019/12/11/Press_Release-Lawrence_VanDyke_confirmed.pdf [<https://perma.cc/ZA98-7SSQ>].

²⁹ See, e.g., Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, 10 WM. & MARY BILL RTS. J. 37, 38 (2001) ("The ABA's participation early in the appointment process appropriately reinforces the constitutional system for nomination and confirmation and adds a stable voice to the power struggles that our Constitution envisions will occur as presidential administrations come and go."). See generally AM. BAR ASS'N, *STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS* (2017),

had to bear the brunt of criticism, including in VanDyke's case.³⁰ At a sometimes emotional hearing before the Senate Judiciary Committee, VanDyke stated, "It is a fundamental belief of mine that all people are created in the image of God and they should all be treated with dignity and respect."³¹ With a combination of good will and watchfulness in all quarters and a generous measure of giving him the benefit of the doubt, perhaps his assurance of treating all before him with dignity and respect and the attendant possibility that he will also treat them fairly will manifest themselves in his behavior. Time may soon tell.

Many of the newly appointed judges have records of academic achievement, law clerkships, and success in their legal careers.³² Some of them have already begun to act with independence, objectivity, and judicial temperament. Others may learn to do so. While recognizing that there are competing views, it bears noting that one of their long-serving judicial colleagues, Judge Diarmuid O'Scannlain, believes that a "sign for hope is in the many promising judges who have recently joined the federal bench," and observes that "they will decide many thousands of cases—and that means, presumably, many thousands of decisions that will be rooted in a traditional view of the judicial role."³³ Again, while recognizing competing views, it also bears noting that in praising the judicial temperament of Justice Brett

<https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.authcheckdam.pdf> [<https://perma.cc/Y4P3-YCQ5>] (describing the Committee's process for evaluating nominees).

³⁰ See, e.g., Josh Blackman, *The American Bar Association Broke Its Own Rules*, ATLANTIC (Nov. 6, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/aba-nominations-process-vandyke/601441/> [<https://perma.cc/6X7A-RFX2>] (accusing the Committee of bias and describing the evaluation of Judge VanDyke as resting on "unfounded accusations" and departing from the Committee's own procedural rules). Professor Blackman has also suggested that Republican-appointed judges take senior status so that President Trump will have more judgeships to fill. Josh Blackman, *A Better Way to Give Trump More Judgeships to Fill*, NAT'L REV. (Dec. 18, 2017, 9:00 AM), <https://www.nationalreview.com/2017/12/trump-courts-republican-appointed-judges-should-take-senior-status/> [<https://perma.cc/TZZ9-KBTZ>].

³¹ Hannah Knowles, *Trump Judicial Nominee Cries over Scathing Letter from the American Bar Association*, WASH. POST (Oct. 30, 2019, 9:35 PM), <https://www.washingtonpost.com/politics/2019/10/30/trump-judicial-nominee-cries-over-scathing-letter-american-bar-association/> [<https://perma.cc/L5CA-YPSG>].

³² See Ian Milhiser, *What Trump Has Done to the Courts, Explained*, VOX (Feb. 4, 2020), <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges> [<https://perma.cc/2PGK-ZMN4>] (finding that around 40% of Trump nominees clerked for a Supreme Court Justice); see also STANDING COMM. ON THE FED. JUDICIARY, RATINGS OF ARTICLE III AND ARTICLE IV JUDICIAL NOMINEES: 116TH CONGRESS (2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-trump116.pdf?logActivity=true [<https://perma.cc/E9VU-7ZKV>] (listing the Committee ratings of judicial nominees before the 116th Congress and rating the majority of nominees as "well qualified" or "qualified").

³³ Diarmuid F. O'Scannlain, *The Future of the Federal Judiciary*, 20 FEDERALIST SOC'Y REV. 138, 141 (2019).

Kavanaugh, former Attorney General and federal judge Michael Mukasey referred to Kavanaugh's unanimous well-qualified rating by the ABA Standing Committee on the Federal Judiciary and said that Kavanaugh had served in his prior role as a judge on the D.C. Circuit "with distinction and earned widespread respect across the ideological spectrum."³⁴

As a realistic and collegial matter, it seems likely that the judicial colleagues of the new judges will welcome them cordially to the bench and their share of the workload and encourage and guide them to follow the judicial norms and traditions of an elite club. Given the President's admitted bias in appointments together with his attacks on the judiciary, however, it would be prudent to avoid making any rosy assumptions that they all will be paragons of judicial virtue and that incidents of judicial misbehavior will not rise in number and cause lasting harm.

In contrast with norms and systems of accountability in many other contexts, including state judiciaries, federal judges govern themselves and are rarely subject to censure, reprimand, reassignment, or other discipline short of removal. In his Madison Lecture, *Judicial Governance and Judicial Independence*, Senior Circuit Judge Anthony J. Scirica stated, "Congress has fostered and validated the federal judiciary's capacity for self-governance."³⁵ In his leading article, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, Senior Circuit Judge Harry T. Edwards "conclude[d] with the belief that judicial self-regulation over matters that do not involve impeachable or criminal action is the proper approach to uphold that tradition of judicial independence."³⁶

Such a regime helps foster judicial independence and autonomy. It also is "vulnerable to pathologies of self-interest" and may enable petty tyrants and other outliers to engage in abusive behavior on the bench and in the workplace that may go uncorrected for decades.³⁷ In addition to other stresses on the federal judiciary, the President's new appointments will test its capacity for

³⁴ Michael Mukasey, *On the Question of Judicial Temperament*, REALCLEARPOLITICS (Oct. 4, 2018), https://www.realclearpolitics.com/articles/2018/10/04/on_the_question_of_judicial_temperament_138257.html [https://perma.cc/VZ4F-BU5R].

³⁵ Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779, 780 (2015).

³⁶ Edwards, *supra* note 10, at 796. Self-regulation can take many forms, including filing a formal complaint against a fellow judge. Upon learning from newspaper accounts about a Montana district court judge's racist interoffice email messaging, a Third Circuit judge filed a complaint which ended with the Judicial Council of the Ninth Circuit issuing a reprimand and a 180-day case suspension, as well as requiring the Montana judge to issue an apology and undergo ethics training. See Clair Johnson, *3rd Circuit Chief Judge Satisfied with Cebull Investigation*, BILLINGS GAZETTE (Jan. 29, 2014), https://billingsgazette.com/news/state-and-regional/crime-and-courts/rd-circuit-chief-judge-satisfied-with-cebull-investigation/article_cca958e1-3316-579e-8bf6-a81d7d799416.html [https://perma.cc/FS4K-CLYD].

³⁷ Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 YALE L. & POL'Y REV. 33, 71-72 (2012).

self-governance. According to a recent report, of the almost 11,000 complaints terminated from 2010 to 2018, only thirty-three resulted in disciplinary actions against the misbehaving judge.³⁸ Removal after impeachment is even rarer.³⁹

If judicial errors in cases increase with the new appointments, they should be subject to correction on appellate review. However, if the President's appointments to the Supreme Court and to the courts of appeals do what he and others say they should do,⁴⁰ these "errors" may become law and the basis of a different federal jurisprudence,⁴¹ one that may impel some litigants to seek relief in state courts and others to seek relief in federal courts.⁴² Abusive judicial behavior, however, is not readily correctable by appellate review or absorbed by the case law, and it can make life in the courtroom and the courthouse miserable for the victims and a sorry sight for the observers for a long time. In his classic article, *A Trial Judge's Freedom and Responsibility*, Judge Charles Wyzanski stated, "What counts more than the rooting out of error is the establishment of affirmative norms of judicial behavior."⁴³ Abusive behavior should be contrasted with the infrequent, justifiable, and righteous judicial anger that even the most dispassionate, temperate, respectful, decent, compassionate, and emotionally intelligent judges are provoked to show by

³⁸ Kimberly Strawbridge Robinson, *Judges Policing Judges: True Disciplinary Actions Are Rare*, BLOOMBERG L. (Sept. 26, 2019, 4:50 AM), <https://news.bloomberglaw.com/us-law-week/judges-policing-judges-true-disciplinary-actions-are-rare> [<https://perma.cc/K7KP-HBA4>]. The Administrative Office of the U.S. Courts reports annually on complaints about judges that are commenced and the action taken on them. *E.g.*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2019, at tbl.S-22 (2019), https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2019.pdf [<https://perma.cc/WN2V-8B7R>].

³⁹ See *Judges and Judicial Administration—Journalist's Guide*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide> [<https://perma.cc/3AKH-YN8B>] (last visited Mar. 20, 2020) ("[O]nly 15 federal judges have been impeached, and only eight have been convicted. Three others resigned before completion of impeachment proceedings.").

⁴⁰ See *supra* notes 18–22 and accompanying text (discussing Trump's promises and commentators' concerns that Trump's judicial nominees would vote in an ideologically conservative manner).

⁴¹ See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001) ("When enough members of a particular party are appointed to the federal judiciary, they start to change the understandings of the Constitution that appear in positive law."); Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 534 (2018) ("[I]deology shapes perception. . . . Appointments processes aimed at pushing the Court in an ideologically defined direction raise the prospect of increasing polarization within the Court itself.").

⁴² On the development of state constitutional rights, for example, see generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304 (2019); Jeffrey S. Sutton, *A Response to Justice Goodwin Liu*, YALE L.J.F. 936 (2019).

⁴³ Charles E. Wyzanski, Jr., *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1282 (1952).

misbehaving lawyers or by lawless government officials or corporate executives engaged in moral wrongs.⁴⁴

Victims and observers of abusive judicial behavior may be reluctant to complain. (This goes for abusive behavior in general by those in power, but some brave officials and citizens do stand up, for example, Archibald Cox,⁴⁵ William Ruckelshaus,⁴⁶ Sally Yates,⁴⁷ and Margaret Chase Smith,⁴⁸ to name just a few.)⁴⁹ Lawyers may adapt or wish to avoid possible retaliation against themselves and their firms and clients. Law clerks may be reluctant to upset the judges they are clerking for or risk harm to their careers. Judicial staff may likewise fear retaliation. Chief judges and other judges may be reluctant to

⁴⁴ See *Liteky v. United States*, 510 U.S. 540, 555-56 (1994) (“Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.”); Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207 (2012) (proposing the model of the “righteously angry judge,” whose anger is justified by “good reasons” and who manifests the anger in an “appropriate” manner). As Richmond explains,

When judges move beyond occasional displays of anger, frustration, or impatience and intentionally abuse or denigrate those who appear before them, they may be fairly described as bullies. This label is apt because bullying is characterized by a power imbalance between bullies and their targets, and judges unquestionably wield great power over lawyers, litigants, jurors, and witnesses. When individual judges bully, they expose all judges to public contempt.

Douglas R. Richmond, *Bullies on the Bench*, 72 LA. L. REV. 325, 330 (2012).

⁴⁵ See Ron Elving, *A Brief History of Nixon’s ‘Saturday Night Massacre,’* NPR (Oct. 21, 2018, 8:12 AM), <https://www.npr.org/2018/10/21/659279158/a-brief-history-of-nixons-saturday-night-massacre> [<https://perma.cc/A8R5-GKU8>] (discussing how Special Prosecutor Archibald Cox obtained a subpoena for the Watergate tapes when the Nixon Administration refused to cooperate with his investigation, leading to Cox’s subsequent firing in the Saturday Night Massacre).

⁴⁶ See Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST (Oct. 21, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm> [<https://perma.cc/YS5Z-SJN4>] (discussing Deputy Attorney General William D. Ruckelshaus’s resignation after he refused to follow Nixon’s order to dismiss Special Prosecutor Cox).

⁴⁷ See Mark Berman at al., *Trump Has Fired the Acting Attorney General Who Ordered Justice Dept. Not to Defend President’s Travel Ban*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/world/national-security/acting-attorney-general-an-obama-administration-holdover-wont-defend-trump-immigration-order/2017/01/30/a9846f02-e727-11e6-b82f-687d6e6a3e7c_story.html [<https://perma.cc/6S6F-R3JR>] (describing Trump’s firing of Acting Attorney General Sally Yates after she refused to defend his temporary travel ban).

⁴⁸ See Richard Pearson, *Margaret Chase Smith Dies*, WASH. POST (May 30, 1995), <https://www.washingtonpost.com/archive/local/1995/05/30/margaret-chase-smith-dies/8dd98614-aaa4-4a94-8d6b-0fda297b95b4/> [<https://perma.cc/6RET-XQJS>] (remembering Senator Smith’s “declaration of conscience” speech rejecting the McCarthyite majority’s rule by “fear, ignorance, bigotry and smear”).

⁴⁹ See Michael Traynor, *Citizenship in a Time of Repression*, 2005 WIS. L. REV. 1, 28-34 (calling for “citizens [to] stand up against the repression of truth, openness, and liberty” when under attack by even the government).

confront their abusive colleagues or invest the time to intervene. As one astute commentator has written, “accountability requires tenacity.”⁵⁰

The federal judiciary has an institutional interest, however, in preserving self-governance and independence from legislative or other intrusion and hence in measures and monitoring that will both minimize abuse and deter unwanted intrusion. As Stephen Burbank points out in *Reconsidering Judicial Independence*, among many lessons he has learned during his many years of experience and contributions, “[b]y far the most important of those lessons is the central role that judicial accountability plays in enabling judicial independence.”⁵¹ Instead of considering the present system as the least worst alternative,⁵² the federal judiciary can strive to make its system the best alternative.

In a rare rebuke to the President, Chief Justice Roberts stated, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”⁵³ In his fifteen-page *2018 Year-End Report on the Federal Judiciary*, he devoted seven pages to his and the federal judiciary’s ongoing commitment and challenge to “strengthen our culture of accountability and professionalism” “throughout our federal court system.”⁵⁴ In his 2019 year-end report, he emphasized judicial independence and the key role of federal judges in civic education.⁵⁵ With the Chief Justice’s leadership, if the federal judiciary stays alert to misbehavior and confronts and deals with it effectively, it should be able to preserve its independence and self-governance. The federal judiciary should also expect increased public and

⁵⁰ Brooke D. Cameron, *Accountability Requires Tenacity*, JOTWELL (Apr. 23, 2019), <https://courtslaw.jotwell.com/accountability-requires-tenacity/> [<https://perma.cc/6QJX-U3WN>] (reviewing Law Clerks for Workplace Accountability, Comment Letter on the Judicial Conference of the United States’ Proposed Changes to the Code of Conduct for U.S. Judges and Judicial Conduct & Disability Rules (Nov. 13, 2018)).

⁵¹ Burbank, *supra* note 4, at 19.

⁵² See, e.g., John W. Dean, *Thoughts on the Law Addressing Bad Federal Judges: Self-Policing Isn’t Working, but Is There a Good Alternative?*, FINDLAW (Aug. 13, 2004), <https://supreme.findlaw.com/legal-commentary/thoughts-on-the-law-addressing-bad-federal-judges.html> [<https://perma.cc/AP8L-CA6A>] (pointing out some of the glaring faults in the current system, including lack of transparency and quality of review).

⁵³ See Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [<https://perma.cc/W4BQ-CTLL>].

⁵⁴ JOHN ROBERTS, 2018 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10 (2018), <https://www.supremecourt.gov/publicinfo/year-end/2018year-endreport.pdf> [<https://perma.cc/AU7N-5FQY>].

⁵⁵ JOHN ROBERTS, 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2019), <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf> [<https://perma.cc/7U3Y-7ERH>]. The Chief Justice asked his “judicial colleagues to continue their efforts to promote public confidence in the judiciary, both through their rulings and through civic outreach” and to continue to “celebrate our strong and independent judiciary, a key source of national unity and stability.” *Id.*

legislative attention. It should maintain steady and constant oversight and not wait for a scandal to precipitate corrective action.

Judge Alex Kozinski's abrupt resignation from the Ninth Circuit put the spotlight on the judiciary. A complaint was filed against then-Judge Kozinski; Chief Justice Roberts transferred it to the Judicial Council of the Second Circuit, which recognized "that the complaint references grave allegations of inappropriate misconduct, which the federal judiciary cannot tolerate," but concluded that Judge Kozinski's resignation and irrevocable relinquishment of his office precluded inquiry, rendered it without statutory authority, and required it to close the matter.⁵⁶ Then, in February 2020, District Judge Carlos Murguia resigned after being publicly reprimanded by the Judicial Council of the Tenth Circuit for sexually harassing judiciary employees, engaging in an extramarital sexual relationship with a convicted felon, and habitual tardiness for court engagements.⁵⁷ Murguia's resignation, like Kozinski's, required the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States "to conclude the proceedings on the merits," precluding the Committee from considering and recommending "a referral to Congress for consideration of impeachment."⁵⁸ Throughout, the federal judiciary paid attention. Changes were made in March 2019 to the Code of Conduct for U.S. Judges, the Rules for Judicial Conduct and Judicial Disability Proceedings, and the Code of Conduct for Judicial Employees.⁵⁹

⁵⁶ *In re* Complaint of Judicial Misconduct, No. 17-90118, slip op. at 1-3 (2d Cir. Jud. Council Feb. 5, 2018), <http://cdn.cnn.com/cnn/2018/images/02/05/doco20218.pdf> [<https://perma.cc/4T5R-T6AT>]. The Judicial Council's conclusion bears quoting:

The complaint proceeding is therefore concluded. . . . Given the seriousness of the conduct alleged, however, the Judicial Council acknowledges the importance of ensuring that governing bodies with clear jurisdiction are aware of the complaint. Accordingly, the Judicial Council requests that the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States forward a copy of this order to any relevant Congressional committees for their information, and that the Secretary of the Judicial Council forward a copy of this order to all other judicial councils.

Id. at 4. Judge Kozinski's resignation prompted publicity. *E.g.*, Ashby Jones, *Federal Judge Resigns After Sexual-Impropriety Allegations*, WALL STREET J. (Dec. 18, 2017, 11:10 AM), <https://www.wsj.com/articles/federal-judge-to-resign-after-sexual-impropriety-allegations-1513613188> [<https://perma.cc/F9Q4-CT7T>].

⁵⁷ Mihir Zaveri, *Federal Judge in Kansas Resigns After Reprimand for Sexual Harassment*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/us/judge-carlos-murguia-sexual-harassment.html> [<https://perma.cc/JJ7E-4RRH>].

⁵⁸ *In Re* Complaints Under the Judicial Conduct and Disability Act, No. 19-0002, slip op. at 2 (10th Cir. Jud. Council Mar. 3, 2020). The Council stated that "concluding a misconduct proceeding upon a judge's resignation serves important institutional and public interests, including prompting subject judges who have committed misconduct to resign their office." *Id.* at 10.

⁵⁹ *Workplace Conduct in the Federal Judiciary*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/workplace-conduct-federal-judiciary> [<https://perma.cc/6QG2-66KE>] (last visited Mar. 20, 2020).

These changes ensued after the June 2018 *Report of the Federal Judiciary Workplace Conduct Working Group*⁶⁰ and the 2018 recommendations of the Committee on Judicial Conduct and Disability chaired by Judge Anthony Scirica and the Committee on Codes of Conduct chaired by Judge Ralph Erickson,⁶¹ following an informative and important all-day hearing cochaired by Judges Scirica and Erickson on October 30, 2018.⁶²

The revised rules define “misconduct” generally as “conduct prejudicial to the effective and expeditious administration of the business of the courts” and include an itemized list of violations of specific standards of judicial conduct as well as other abusive or harassing behavior.⁶³ The revised Code of Conduct provides that “[a] judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity,”⁶⁴ and that

[a] judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge should not engage in any form of harassment of court personnel. A judge should not retaliate against those who report misconduct. A judge should hold court personnel under the judge’s direction to the same standards.⁶⁵

⁶⁰ FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (2018), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [<https://perma.cc/Z4LY-JJZF>].

⁶¹ See COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., PROPOSED CHANGES TO THE CODE OF CONDUCT FOR U.S. JUDGES (2018), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_u.s._judges_proposed_changes_-_9-13-2018.pdf [perma.cc/KED9-2AZP] (setting out recommended changes to the Code of Conduct for U.S. Judges); COMM. ON JUDICIAL CONDUCT AND DISABILITY, JUDICIAL CONFERENCE OF THE U.S., PROPOSED CHANGES TO THE RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2018), https://www.uscourts.gov/sites/default/files/jcd_rules_redline_-_proposed_changes_-_9.13.18_0.pdf [<https://perma.cc/U72R-V4LX>] (setting out recommended changes to the Rules for Judicial-Conduct and Judicial-Disability Proceedings).

⁶² United States Courts, *Public Hearing: Proposed Changes to Judges’ Code of Conduct & Judicial Conduct and Disability Rules*, YOUTUBE (Oct. 30, 2018), <https://youtu.be/xqzki13SeA> [<https://perma.cc/PU87-7NNX>].

⁶³ ADMIN. OFFICE. OF THE U.S. COURTS, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, in 2 GUIDE TO JUDICIARY POLICY ch. 3, § 320, art. II (2019), https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019_0.pdf [<https://perma.cc/9CRL-GU2B>].

⁶⁴ ADMIN. OFFICE. OF THE U.S. COURTS, *Code of Conduct for U.S. Judges*, in 2 GUIDE TO JUDICIARY POLICY ch. 2, Canon 3(A)(3) (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/S7KJ-9JBU>].

⁶⁵ *Id.* at ch. 2, Canon 3(B)(4).

I have reviewed the recent changes, watched the hearing video, reviewed the witness statements⁶⁶ and other written submissions from noted law professors and others,⁶⁷ the sources on the federal courts' website on judicial conduct and disability,⁶⁸ a sampling of specific dispositions by each of the various circuit court judicial councils of complaints against federal judges,⁶⁹ the appointment of the first officer for the new Office of Judicial Integrity,⁷⁰ the recent reports of the Federal Judiciary Workplace Conduct Working

⁶⁶ See, e.g., *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct, Hearing Before the H. Comm. on the Judiciary, Subcomm. on Courts, Intellectual Prop. & the Internet*, 116th Cong. (2020) (testimony of Deeva V. Shah, founder, Law Clerks for Workplace Accountability) (describing how the “power dynamic alone—with judges seeming larger-than-life—can make it feel near impossible to speak up against a life-tenured federal judge”); *id.* (testimony of Olivia Warren, former clerk to U.S.C.A.J. Stephen Reinhardt) (recounting stories of sexual harassment from her tenure as a clerk for Judge Stephen Reinhardt and how they “indelibly colored my view of the judiciary and its ability to comprehend and adjudicate harm”).

⁶⁷ For public comments on the proposed changes, see generally *Public Comment on Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules*, U.S. COURTS, <https://www.uscourts.gov/rules-policies/judiciary-policies/proposed-changes-code-and-jcd-rules/public-comment-proposed> [<https://perma.cc/E6QQ-5YYJ>] (last visited Mar. 20, 2020).

⁶⁸ *Judicial Conduct & Disability*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability> [<https://perma.cc/CY3G-ZEJ8>] (last visited Mar. 20, 2020); *Workplace Conduct in the Federal Judiciary*, *supra* note 59; see 28 U.S.C. §§ 351–364 (2018) (setting out the process for filing and reviewing complaints against judges); ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 63, at ch. 2 (Code of Conduct for United States Judges); ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 64, at ch. 3 (Judicial Conduct and Disability Act and Related Materials).

⁶⁹ See, e.g., *In re Complaint Under the Judicial Conduct and Disability Act*, No. 10-18-90022 (10th Cir. Jud. Council Sept. 30, 2019) (issuing a public reprimand against U.S.D.J. Carlos Murguia); *In Re Complaint of Judicial Misconduct*, No. 18-90204 (2d Cir. Jud. Council Apr. 1, 2019) (declining to reach merits of the complaint against U.S.C.A.J. MaryAnne Trump Berry); *In Re Complaint of Judicial Misconduct*, No. 02-17-90118 (2d Cir. Jud. Council Apr. 17, 2018) (declining to reach the merits of complaint against U.S.C.A.J. Alex Kozinski); *In Re Complaint of Judicial Misconduct*, No. 06-13-90009 (6th Cir. Jud. Council Feb. 22, 2016) (suspending U.S.D.J. John R. Adams for two years); *In Re Complaint of Judicial Misconduct*, Nos. 12-90026, 12-90032 (9th Cir. Jud. Council Mar. 15, 2013) (ordering U.S.D.J. Richard Cebull to undergo ethics training with a 180-day suspension, and to issue a public apology); *In Re Complaint of Judicial Misconduct*, No. 03-08-90050 (3d Cir. Jud. Council June 5, 2009) (finding that U.S.C.A.J. Alex Kozinski's apology precluded the need for disciplinary action); see also *Complaints Against Judges-Judicial Business 2018*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/complaints-against-judges-judicial-business-2018#table10> [<https://perma.cc/B33W-PP99>] (last visited April 24, 2020) (“The number of complaints filed in 2018 was 1348, an increase of 70 complaints (up 5 percent) from the number filed in 2017.”).

⁷⁰ See *Judicial Integrity Officer Named for Federal Judiciary*, U.S. COURTS (Dec. 3, 2018), <https://www.uscourts.gov/news/2018/12/03/judicial-integrity-officer-named-federal-judiciary> [<https://perma.cc/6CR3-8K4C>] (discussing the appointment of Jill Langley, Director of Workplace Relations for the Tenth Circuit, as the first judicial integrity officer).

Group to the Judicial Conference of the United States,⁷¹ and the June 2019 report of the Ninth Circuit Ad Hoc Committee on Workplace Environment.⁷²

Among the twenty-one witnesses who testified in front of the Committee on Judicial Conduct and Disability and the Committee on Codes of Conduct were law professors, federal judges, private practice lawyers, nonlawyers, and several law students.⁷³ Public comments were submitted from a number of organizations and individuals, including several law schools, law professors, the Chief Bankruptcy Judges for the Ninth Circuit, and the Ninth Circuit Magistrate Judges' Executive Board.⁷⁴

Progress in the law and judicial administration usually occurs incrementally, and even incremental progress can be hard to achieve. My review of the recent incremental progress prompts appreciation for the efforts made by the federal judiciary as well as my friendly and main suggestion that it remain vigilant and active. Although this is no time to coast, it is understandable that the federal judiciary will need some time to absorb and get used to the changes as well as consider various reactions to them. My review also prompts the observation that the federal judiciary could have conducted judicial house-cleaning with regularity and rigor and not waited for a scandal to impel reforms.⁷⁵ I also venture a few specific suggestions for possible consideration with a view to helping the federal judiciary continue

⁷¹ FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., *supra* note 60; FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., JUDICIAL CONFERENCE OF THE U.S., STATUS REPORT FROM THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (2019), https://www.uscourts.gov/sites/default/files/working_group_status_report_to_jcus_september_2019_0.pdf [<https://perma.cc/CN4S-XDWP>] [hereinafter FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., STATUS REPORT].

⁷² NINTH CIRCUIT AD HOC COMM. ON WORKPLACE ENV'T, NINTH CIRCUIT AD HOC COMMITTEE ON WORKPLACE ENVIRONMENT REPORT (2019), <https://www.ca9.uscourts.gov/workplace/committee-report/Ninth-Circuit-Workplace-Environment-Committee-Report.pdf> [<https://perma.cc/5GER-UXY8>].

⁷³ *See* COMM. ON CODES OF CONDUCT & COMM. ON JUDICIAL CONDUCT AND DISABILITY, PUBLIC HEARING ON PROPOSED CHANGES TO CODE OF CONDUCT FOR U.S. JUDGES AND RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS: WITNESS LIST (2018), https://www.uscourts.gov/sites/default/files/witness_list_public_hearing_on_proposed_changes_to_judges_code_and_rules_1.pdf [<https://perma.cc/DAB7-5B3S>].

⁷⁴ *See generally* Public Comment on Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules, *supra* note 67 (collecting public comments on the proposed changes).

⁷⁵ For example, Judge Kozinski's behavior was reviewed by the Third Circuit Judicial Council in 2009, almost a decade before other behavioral issues were before the Second Circuit Judicial Council in 2018. *See In re Complaint of Judicial Misconduct*, No. 03-08-90050, slip op. (3d. Cir. Jud. Council June 5, 2009), <http://www2.ca3.uscourts.gov/opinarch/089050p.pdf> [<https://perma.cc/AAR9-83F6>] (detailing allegations of sexual impropriety). His reputation and workplace conduct were known to many for a long time.

its system of self-governance without interference while also protecting the public from abusive judicial behavior⁷⁶:

- Periodically evaluate the recent reforms and recommend changes from time to time as appropriate. Such an evaluation could include surveys of present and former judicial law clerks and employees, lawyers and bar associations, judges, and a representative sample of complainants to circuit judicial councils. The September 17, 2019, status report from the Federal Judiciary Workplace Conduct Working Group refers specifically to “Authorizing Systemic Evaluations” and notes that “the Judicial Conference and judicial council of the subject judge have ample authority to assess potential institutional issues related to the complaint as part of their respective responsibilities to promote ‘the expeditious conduct of court business.’”⁷⁷ The Working Group also refers to outreach by the new Office of Judicial Integrity to future, current, and former judicial employees and law clerks and to confidential surveys conducted by many circuits and individual courts.⁷⁸
- Review the many constructive statements by testimonial witnesses and others made at and after the October 30, 2018, hearing of the Committee on Judicial Conduct and Disability and the Committee on Codes of Conduct and, in light of experience since then, consider specific suggestions in them that may be helpful and that have not yet been implemented or rejected. The many thoughtful statements included ones from distinguished law professors and law students concerned about judicial misbehavior as well as from law clerks and others in the judicial workplace.⁷⁹

⁷⁶ I note but do not address controversial proposals for structural interventions such as an Inspector General or a national commission system for the federal judiciary. *See generally* Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243, 269 (1999); *see also* Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 JUSTICE SYS. J. 426 (2007) (discussing the statutory creation and precedential 1993 report prepared by the first ever National Commission on Judicial Misconduct and Removal).

⁷⁷ FED. JUDICIARY WORKPLACE CONDUCT WORKING GRP., STATUS REPORT, *supra* note 71, at 11 (quoting 28 U.S.C. § 331 (2018)).

⁷⁸ *Id.* at 17-19

⁷⁹ *See, e.g.*, Charles G. Geyh, Statement at Hearing on Proposed Amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings and the Code of Judicial Conduct (Oct. 30, 2018), [uscourts.gov/sites/default/files/charles_g_geyh_witness_statement_proposed_changes_code_rules_o.pdf](https://www.uscourts.gov/sites/default/files/charles_g_geyh_witness_statement_proposed_changes_code_rules_o.pdf) [perma.cc/2GRT-22KG]; Charles G. Geyh, Supplementary Statement to Testimony at Hearing on Proposed Amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings and the Code of Judicial Conduct (Oct. 30, 2018), https://www.uscourts.gov/sites/default/files/charles_g_geyh_

- Work with national, regional, state, and local bar associations to have in place a reliable system for speaking out publicly about the vital importance of judicial independence, especially when a judge's decision or ruling is unpopular, and for working respectfully with the chief judge and the court on observed problems with judicial behavior. When appropriate, a bar association, upon recommendation of a highly respected committee and when the circumstances call for it (which may be rare), might itself bring a complaint to a chief judge or circuit judicial council. "Any person" may file a complaint, a term that specifically includes associations.⁸⁰ In its September 2006 *Report to the Chief Justice on the Implementation of the Judicial Conduct and Disability Act of 1980*, the Judicial Conduct and Disability Act Study Committee chaired by Justice Stephen Breyer recommended that "courts should consider local bar committees that could serve as conduits between members of the bar and chief judges concerning potential complaints."⁸¹
- Consider whether some system of periodically evaluating judges might be developed, perhaps on a pilot basis in selected district courts and circuit courts.⁸² Although no such formal program exists

supplemental_statement_proposed_changes_code_rules.pdf [perma.cc/U8YK-W28M]; Abbe Gluck & Judith Resnik, Comment Letter on Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules (Nov. 13, 2018), uscourts.gov/sites/default/files/abbe_r_gluck_and_judith_resnik_public_comment_proposed_changes_code_rules_o.pdf [perma.cc/39BQ-S9H8]; Arthur D. Hellman, Statement on Proposed Amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings (September 2018 Draft) (Oct. 30, 2018), https://www.uscourts.gov/sites/default/files/arthur_d_hellman_witness_statement_proposed_changes_code_rules_o.pdf [perma.cc/F79V-YUPF] [hereinafter Arthur D. Hellman Statement]; Arthur D. Hellman, Supplementary Statement on Proposed Amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings (September 2018 Drafts) (Nov. 13, 2018), https://www.uscourts.gov/sites/default/files/arthur_d_hellman_supplemental_statement_proposed_changes_code_rules.pdf [perma.cc/N55S-E82C]; Renee Knake, Comments on the Proposed Changes to the Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules (Oct. 30, 2018), https://www.uscourts.gov/sites/default/files/renee_newman_knake_witness_statement_proposed_changes_code_rules_o.pdf [perma.cc/W6XP-RAN]; Supplemental Statement to Comments on the Proposed Changes to the Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules (Oct. 30, 2019), https://www.uscourts.gov/sites/default/files/renee_newman_knake_supplemental_statement_proposed_changes_code_rules.pdf [perma.cc/Y59U-A2BJ].

⁸⁰ 28 U.S.C. § 351(a) (2018); *id.* § 3701(4); 1 U.S.C. § 1; *see also* Scirica, *supra* note 35, at 787 n.58 ("A complainant need not be a litigant. It could be anyone responding to something read or seen in the media.").

⁸¹ JUDICIAL CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 119 (2006), <https://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf> [https://perma.cc/74ZS-RX7W]. On the report, *see generally* Hellman, *supra* note 76.

⁸² *See Judicial Performance Evaluation Resource Guide*, NAT'L CTR. FOR ST. CTS., <https://www.ncsc.org/Topics/Judicial-Officers/Judicial-Performance-Evaluation/Resource-Guide.aspx> [https://perma.cc/DUF5-BU8N] (last updated Oct. 18, 2017) (collecting resources for developing programs to evaluate state court judges).

for the federal district or circuit courts, dozens of state judiciaries are subject to Judicial Performance Evaluation programs (JPEs) through legislative acts, rules authorized by state supreme courts, and local bar associations.⁸³ Such programs have included in their procedural mechanics questionnaires, video and audio recordings, courtroom observations, background investigations, and old-fashioned interviews.⁸⁴ Federal efforts have been fragmented;⁸⁵ attempts to institute evaluation programs have been unsuccessful in attaining any consistent longevity.⁸⁶ A line of excellent scholarship advocates for and provides suggestions for designing possible federal judiciary evaluation programs.⁸⁷

- Encourage chief judges of district courts and circuit courts to engage actively in addressing problems of judicial misbehavior. The chief judge of a district court or circuit court may be able to persuade a senile or mentally incompetent judge to retire, or an alcoholic judge to get treatment, or a judge undergoing a period of severe stress to get professional help, or a judge to understand that his or her colleagues are concerned about behavioral issues that are adversely affecting the court's reputation. A light touch often can be more effective than a heavy hand. Confidentiality, courtesy, candor, and respect to an impaired or abusive colleague may be more effective than public exposure, caustic comment,

⁸³ See Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 9-12 (2008) (discussing the purpose and design of JPEs).

⁸⁴ The Idaho Supreme Court, for example, has attorney feedback surveys as part of its court mandated JPE. *Judicial Performance Evaluation Program*, STATE OF OHIO JUDICIAL BRANCH: SUPREME COURT, https://isc.idaho.gov/main/judicial_performance_evaluation_program [<https://perma.cc/E8VL-B7YA>] (last visited Mar. 20, 2020). New Hampshire's Supreme Court includes self-evaluations and questionnaires, as well as guidance on negative evaluation results. N.H. SUPREME COURT, RULES OF THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE R. 56 (2020), <https://www.courts.state.nh.us/rules/scr/scr-56.htm> [<https://perma.cc/ND5Q-5DJS>]. Utah's Judicial Performance Evaluation Commission, established by the legislature, incorporates courtroom observation into its JPE program. *Full Evaluation Details*, UTAH JUDICIAL EVALUATION COMM'N, <https://judges.utah.gov/process/full-time-evaluation-details/> [<https://perma.cc/U5WP-JLVF>] (last visited Apr. 10, 2020).

⁸⁵ Russell Wheeler, as recently as 2014, attributed the lack of pressure to institute federal JPEs to the "little interest in such evaluations on the federal level, just as there has been little interest in electing federal judges." Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 523 (2014).

⁸⁶ See Kourlis & Singer, *supra* note 83, at 15-19 (providing a historical account of failed attempts to establish a permanent federal evaluation program).

⁸⁷ See generally, e.g., Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965 (2009) (advocating for a system of judicial notice-and-comment to provide feedback on decisions by federal judges); Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383 (2009) (commenting in detail on the value of having methods of evaluating federal circuit judges and suggesting an empirical approach to judicial appointments); Kourlis & Singer, *supra* note 83 (summarizing aspects of state JPEs, discussing the history of attempts at federal JPEs, and prescribing a pilot federal JPE).

or disdain. A skilled and conscientious chief judge can help a colleague avoid or mitigate abusive behavior.⁸⁸ As Senior Circuit Judge Anthony J. Scirica has written, “Indeed, by virtue of their leadership role within a court, ‘the power to monitor judicial conduct may be inherent in the position of chief judge.’”⁸⁹

- Consider whether circuit judicial council websites and information about how to make a complaint about judicial misbehavior might be made more user-friendly and transparent and less forbidding.⁹⁰ The general problem with complaints is that they immediately fail because the complainants do not differentiate between issues reviewable on appeal and issues of judicial misbehavior on the bench or in the workplace that are not so reviewable.⁹¹ Each of the thirteen circuit court websites include essentially a brief form statement on how to file a complaint, followed by a single sentence that “[a]lmost all complaints in recent years have been dismissed because they do not follow the law about such complaints.”⁹² It bears noting that in 2006, the *Breyer Committee Report* stated that the courts that presented the information at the time of the report did so “in a way that would stump most persons seeking to learn about how to file a complaint.”⁹³

⁸⁸ At the Public Hearing on Proposed Changes to Code of Conduct for U.S. Judges and Rules for Judicial-Conduct and Judicial-Disability Proceedings, for example, Chief District Judge Lawrence O’Neill of the U.S. District Court for the Eastern District of California, testified orally about the role of a chief judge in dealing with a troubled colleague. United States Courts, *supra* note 62, at 11:58–34:34; *see also* Edwards, *supra* note 10, at 795 (“The threat of peer condemnation tempers even the most arrogant judge, so we can be sure that individual independence does not insulate a judge from effective peer regulation.”).

⁸⁹ Scirica, *supra* note 35, at 796 (quoting Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 279 (1993)).

⁹⁰ *See, e.g.*, Arthur D. Hellman Statement, *supra* note 79, at 4 (“[M]aking the Rules user-friendly for members of the public as well as for judges will help to demonstrate the judiciary’s commitment to transparency—and at little if any cost.”); Michael Traynor, Letter to the Honorable Mary M. Schroeder, Chief Judge of the Ninth Circuit (Sept. 25, 2007) (on file with author) (commenting that earlier proposed rules “do not seem as user-friendly or logically sequential or as clear and helpful as the 9th Circuit rules.”).

⁹¹ The revised Rules for Judicial-Conduct and Judicial-Disability Proceedings provide specifically that “allegations related to the merits of a decision or procedural ruling” and “allegations about delay” do not constitute “cognizable misconduct.” ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 63, at ch. 3, § 320, art. II(b).

⁹² *E.g.*, *Judicial Conduct*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, http://www.ca2.uscourts.gov/judges/judicial_conduct.html [perma.cc/8YT8-S44S] (last visited Mar. 20, 2020); *Judicial Conduct & Disability*, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/rules-and-procedures/judicial-conduct-disability> [perma.cc/SU35-UK27] (last visited Mar. 20, 2020); *see also* Hellman, *supra* note 76, at 428–29 (stating that “[t]he overwhelming majority of the complaints—more than 95 percent—are dismissed by the chief judge,” usually because they are “directly related to the merits of a decision or procedural ruling” or “frivolous”).

⁹³ JUDICIAL CONDUCT & DISABILITY ACT STUDY COMM., *supra* note 81, at 109.

- Consider whether judicial temperament could be evaluated more rigorously in the selection and confirmation process. Perhaps even more probing inquiries by members of the ABA Standing Committee on the Federal Judiciary, judicial advisory committees established by individual senators, FBI agents conducting security and background checks, key people in the White House Counsel's office and in the Department of Justice, and members of the Senate Judiciary Committee and their staffs might yield information that if credible would bear on the selection of federal judges, help prevent the nomination and confirmation of judges whose past abusive behavior is a potential and perhaps likely predictor of future behavior, and reduce the likelihood of "judgitis." ("Judgitis" is now defined in Black's Law Dictionary as "[a]n emotional disequilibrium that occurs in the mind of a judge who confuses the trappings of judicial office with his or her own personal grandeur; the self-important condescension to which certain emotionally insecure judges are susceptible.")⁹⁴
- Consider whether there is any remedy within the existing system or by possible legislation to address the Kozinski maneuver of resigning and relinquishing office, thereby precluding further judicial inquiry into serious questions of misbehavior.

These suggestions are intentionally brief. There is a rich body of literature on judicial independence and accountability.⁹⁵ If the federal judiciary is vigilant and confronts judicial misbehavior promptly and effectively, with rigor and integrity, it should be able to preserve both its independence and the system of self-governance it has guarded so carefully.⁹⁶ It was encouraging to see in the federal judiciary's current budget request summary a fund increase recommendation for the AO's Office of Judicial Integrity, with

⁹⁴ *Judgitis*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Judgitis" is a new addition that Editor-in-Chief Bryan Garner is "particularly proud of" that refers to "the syndrome of a judge feeling full of him or herself." Stephan Francis Ward, *Bryan Garner on Legal Neologisms and How 'Black's Law Dictionary' Keeps Up*, A.B.A. J. (July 7, 2014), https://www.abajournal.com/news/article/podcast_monthly_episode_52 [<https://perma.cc/PLB7-69BK>]; see Marcel Strigberger, *Judging the Judges: With All Due Respect, of Course*, A.B.A. J. (Jan. 31, 2019, 6:30 AM), <http://www.abajournal.com/voice/article/judging-the-judges-with-all-due-respect-of-course> [<https://perma.cc/3A58-U6HP>] (discussing "judgitis" in Canadian courts); cf. DAVID HARE, *MURMURING JUDGES* (1991) (criticizing judges, lawyers, police, and prisons in England).

⁹⁵ E.g., Fallon, *supra* note 41; Geyh, *supra* note 89; Scirica, *supra* note 35; Frans van Dijk & Geoffrey Vos, *A Method for Assessment of the Independence and Accountability of the Judiciary*, 9 INT'L. J. FOR CT. ADMIN., no. 3, 2018, at 1.

⁹⁶ See Remus, *supra* note 37, at 69-70 ("Over time and as a product of custom, Congress has developed heightened protections of judicial independence. . . . [But] judicial conduct regulation provides fertile ground for increased congressional involvement in judicial affairs.").

specific reference to the proceedings concerning workplace misconduct at the 2019 Judicial Conference.⁹⁷ If, however, the federal judiciary is defensive, hostile, inactive, inert, arrogant, complacent, or disdainful, it risks provoking adverse public and professional opinion, new statutory disciplinary authority,⁹⁸ more demands to impeach and remove bad judges, and the unintended consequences that can attend anecdotal policymaking.⁹⁹ After describing the public perception of judges as “just politicians in black robes,” Judge Friedman wisely stated: “But to my colleagues on the federal bench, I say we cannot sit back smugly and think we are immune from this public reaction to and perception of courts and judges.”¹⁰⁰

Patrick Higginbotham, one of our country’s great judges, once spoke at an ALI annual meeting about his first swearing-in ceremony and mentioned a friend who said,

“Well, Pat, I’ve been to a lot of these swearing-ins, you know, this transmogrification of a lawyer into an Article III judge.” He said “It’s a special occasion. It’s almost a mystical experience.” . . . “[T]his lawyer stands these [sic] and . . . at the end of [the] oath a cloud descends, . . . and when that cloud dissipates this newly transformed lawyer to Article III life-tenured independent cuss will tell three lies within 24 hours. The first is he’s overworked. . . . The second is he is underpaid. . . . And the third and most prevalent lie is, ‘I was a great trial lawyer when I was appointed to the bench.’”¹⁰¹

Professor Brett Scharffs, in an article on the role of humility in exercising practical wisdom notes, “Humility does not even make it into William Bennett’s catalogue of virtues in his *Book of Virtues*. Acknowledgements of the value of humility in judges are limited primarily to retirement tributes and judicial investiture speeches.”¹⁰²

⁹⁷ ADMIN. OFFICE OF THE U.S. COURTS, SUMMARY OF REQUEST: FISCAL YEAR 2021, at 8.10 (2020), https://www.uscourts.gov/sites/default/files/administrative_office_of_the_us_courts_o.pdf [<https://perma.cc/B92D-W6S3>] (requesting and additional \$364,000 to provide for the hiring of two “workplace conduct staff”).

⁹⁸ See generally, e.g., Sam Nunn, *Judicial Tenure*, 54 CHI.-KENT L. REV. 29 (1977) (describing the ineffectiveness of impeachment and proposing alternative of a statutory disciplinary authority).

⁹⁹ See Miguel de Figueiredo et al., *Against Judicial Accountability: Evidence from the Six Month List 6* (Feb. 20, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2989777&download=yes [<https://perma.cc/CSM7-8FWL>] (conducting empirical analysis on the effects of the Six Month List on judicial efficiency and concluding that “[t]he lessons of the Six Month List are that legislators ought to be aware of anecdotal policymaking and that in the case of judges in particular, no incentive is better than an incomplete incentive”).

¹⁰⁰ Friedman, *supra* note 17, at 7.

¹⁰¹ Patrick E. Higginbotham, Luncheon Address (May 15, 2001), in AM. LAW INST., REMARKS AND ADDRESSES: 78TH ANNUAL MEETING SPEECHES 19, 23 (2001).

¹⁰² Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 157 n.88 (1998) (citation omitted).

Among other friendly suggestions, perhaps federal judges might revisit the idea of humility, a theme emphasized by Chief Justice Roberts in his most recent year-end report on the federal judiciary.¹⁰³ Humility, kindness, respect for others, and courage are a powerful combination. Judge Richard Arnold “was a model of humility.”¹⁰⁴ For federal judges, new and old, instead of seeking to qualify for an obituary that reads, “Nation’s longest serving judge was a tyrant in the court,”¹⁰⁵ or merely becoming an entry in a modern edition of the nineteenth century book, *Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression*,¹⁰⁶ please consider making a judicial career that seeks to emulate judges who are revered for their values, character, courage, dedication, modesty, and humility.¹⁰⁷ Not everyone can be the “soul of justice,” like my friend and judicial hero Judge Thelton

¹⁰³ ROBERTS, *supra* note 55, at 4 (“We should reflect on our duty to judge without fear or favor, deciding each matter with humility, integrity, and dispatch.”).

¹⁰⁴ POLLY J. PRICE, JUDGE RICHARD S. ARNOLD: A LEGACY OF JUSTICE ON THE FEDERAL BENCH 8 (2009). “In addition to being brilliant and lucid, Richard was courteous, modest, considerate, unpretentious, kind, and a careful and prepared listener. He was an ideal colleague.” Michael Traynor, *Judge Richard Arnold: His Collegiality and Concurring Opinions*, 58 ARK. L. REV. 545, 545 (2005). Although he was a friend of Judge Richard Posner’s, “he did not believe that any judge on the Eighth Circuit merited such an indictment” as the following one by Judge Posner:

A federal judge can be lazy, lack judicial temperament, mistreat his staff, berate without reason the lawyers and litigants who appear before him, be reprimanded for ethical lapses, verge on or even slide into senility, be continually reversed for elementary legal mistakes, hold under advisement for years cases that could be decided perfectly well in days or weeks, leak confidential information to the press, pursue a nakedly political agenda, and misbehave in other ways that might get even a tenured civil servant or university professor fired; he will retain his office.

PRICE, *supra*, at 351-52 (quoting RICHARD A. POSNER, *OVERCOMING LAW* 111 (1995)).

¹⁰⁵ Joe Matthews, *Nation’s Longest Serving Judge Was a Tyrant in the Court: That It Required Death to Retire U.S. District Judge Manuel Real Is a Scandal that Survives Him*, MERCURY NEWS (Aug. 2, 2019, 5:10 AM), <https://www.mercurynews.com/2019/08/02/mathews-nations-longest-serving-judge-was-a-tyrant-in-the-court/> [<https://perma.cc/NKK5-NV5X>]; see also Debra Cassens Weiss, *Federal Judge Reprimanded for ‘Very Serious’ Long-Term Misbehavior Involving Employees and Felon*, A.B.A. J. (Oct. 1, 2019, 10:15 AM), <http://www.abajournal.com/news/article/federal-judge-reprimanded-for-very-serious-long-term-misbehavior-involving-employees-and-felon> [<https://perma.cc/CJ63-7DDB>] (describing the Tenth Circuit’s public reprimand of U.S.D.J. Carlos Murguía).

¹⁰⁶ JOHN CAMPBELL, *ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION* (Richard Hildreth ed., New York, Miller, Orton & Mulligan 1856).

¹⁰⁷ An increasing number of federal judges have begun to participate in Civil Discourse and Difficult Decisions, an outreach program hosted by the Administrative Office of the U.S. Courts to help students obtain “legal and life skills needed to settle disputes successfully in a respectful way.” See *Federal Judges Help Students Learn Civility Skills*, U.S. COURTS (Jan. 10, 2020), <https://www.uscourts.gov/news/2020/01/10/federal-judges-help-students-learn-civility-skills> [<https://perma.cc/3BUR-V9LV>].

Henderson who served the public and the judiciary with distinction for nearly four decades.¹⁰⁸ But they can try.

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¹⁰⁸ For more on Judge Thelton Henderson, see Abby Ginzberg's award-winning documentary *SOUL OF JUSTICE: THELTON HENDERSON'S AMERICAN JOURNEY* (California Newsreel 2010); see also RICHARD B. KUHNS, *JUDGE THELTON HENDERSON: BREAKING NEW GROUND* (2017).